JD(SF)–34–04
Lebanon, MO

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

THE DURHAM COMPANY

and Case 17-CA-21947

UNITED FOOD AND COMMERCIAL
WORKERS DISTRICT UNION LOCAL TWO

Stanley D. Williams, Esq.
of OverlandPark, Kansas,
for the General Counsel.

Robert C. Johnson, Esq., and *Stuart I. Cohen, Esq*.
(*Husch & Eppenberger, LLC*)
of Kansas City and St. Louis, Missouri,
for the Respondent.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at Lebanon, Missouri on February 18-20, 2004. On October 24, 2002, United Food and Commercial Workers Union Local Two (the Union) filed the charge alleging that The Durham Company (Respondent) committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). The Union filed the first amended charge on December 27, 2002. The second amended charge was filed by the Union on January 28, 2003. On January 31, 2003, the Regional Director for Region 17 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(1) and (3) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses[1] and having considered the post-hearing briefs of the parties, I make the following:

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Findings of Fact and Conclusions

I. Jurisdiction

Respondent is a corporation with an office and place of business in Lebanon, Missouri, where it is engaged in the manufacture of electrical enclosures for electrical utilities. During the twelve months prior to issuance of the complaint, Respondent purchased goods valued in excess of $50,000 directly from suppliers located outside the State of Missouri. Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Background and Issues

The complaint alleges that Respondent promulgated and maintained a rule prohibiting union solicitations and distributions while permitting other non-business related solicitations and distributions. The complaint further alleges that Respondent unlawfully issued warnings to employees Brian Blair and Craig Blair, and discharged Craig Blair in order to discourage union membership and activities.

B. Facts and Preliminary Conclusions

During May and June 2002, the Union held a series of meetings for Respondent's production and maintenance employees.[2] Employees Brian and Craig Blair, brothers, made the first contact with the Union and were the employee leaders of the organizing campaign. Respondent admits knowledge of the union activities of the Blair brothers. On May 24, 2002, Respondent issued a memorandum to employees in which it contended that Respondent and its employees would be better off without a union. General Counsel concedes that there was nothing unlawful in Respondent's memorandum. Further, Respondent's management held two meetings with employees in which management voiced its opinion that the Company and its employees were better off without a union. Again, General Counsel does not allege that Respondent made any unlawful statements at these meetings. The Union's meetings with Respondent's employees ended at the latter part of June 2002.

On or about July 8, 2002, Respondent posted no-solicitation and distribution rules on its employee bulletin boards. Prior to this time Respondent had no established policy regarding solicitations and had permitted non-business solicitations for charitable, fundraising, and even commercial purposes. The new rules stated:

> Rules Concerning Distributions, Solicitations and Access on Company Property: All employees are expected to adhere to these rules at all times:

[2] At the times material herein, there were approximately 300 employees at Respondent's Lebanon, Missouri facility. Respondent also operated a facility at Houston, Missouri.

(1) Distribution of advertising material, handbills or other literature in working areas of the company premises or in areas where customers of the company regularly come is prohibited at any time.

(2) Solicitation by an employee of another employee is prohibited where either the person doing the soliciting or the person being solicited is on working time. "Working time" is the period when an employee is required to perform his job duties, but does not include lunch hours, scheduled breaks, time before shift, after shift, clean-up time or time when an employee is checking in or out of work.

(3) Employees are not permitted access to the interior of the company premises or facility or into other working areas during the employee's off-duty hours.

General Counsel concedes that the rules are lawful on their face but contends that the rules were published in response to the Union organizing drive and changed Respondent's pre-existing policy of allowing non-business related solicitations and distributions. It is settled law that an otherwise valid no-solicitation no-distribution rule violates the Act "when it is promulgated to interfere with the employee right to self-organization rather than to maintain production and discipline. *Cannondale Corp.*, 310 NLRB 845 (1993); *Harry M. Stevens Services*, 277 NLRB 276 (1985), citing cases. See also *Mack's Supermarkets*, 288 NLRB 1082, 1096-1097 (1988). In *Dillon Companies, Inc.,* 340 NLRB No. 151 (2003) the Board stated:

> Where, as here, the rule has lain dormant for a substantial period of time, and is resurrected only in the context of a union campaign, there is a reasonable presumption of a nexus between those two events. In addition, if the timing can be explained by matters apart from the campaign, the Respondent, as the promulgator, is in the best position to adduce evidence of that explanation. Phrased differently, once it is shown that the rule was promulgated in the context of a union campaign, the burden of explanation lies with the employer.

In the instant case, it is clear that Respondent changed its existing policy in response to the Union's campaign. Respondent has offered no evidence to rebut the inference that the new rules were intended to limit employee-organizing activity. Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act.

As stated earlier, in April 2002, Craig Blair, and his brother Brian, made the first contact with the Union. Initially employee Randy Marcum supported the union organizing activities of Craig Blair. However, on May 17, 2002, Craig and Marcum had an argument about support for the Union. Marcum told Craig that he should cease his organizing activities and that if Craig did not, several employees would physically beat him up. Marcum also threatened Craig with physical harm. Craig reported this incident to John Douglas Russell, Respondent's president. Russell instructed James Tucker, production manager, to investigate the situation. Marcum had already reported to Tucker that he had said certain things that "he was sorry for." Marcum told Tucker that he had not laid a hand on or touched Craig Blair. After Russell spoke to him, Tucker attempted to question Craig about the confrontation with Marcum. However, Craig, saying he was upset, had left for the day.

On the next workday, Tucker spoke with Craig Blair and asked what had happened with Marcum. Craig told Tucker that he had told Marcum, that if he was not going to support the Union, Craig did not want to hear him whining about Respondent. Marcum then became angry and stated that several employees wanted to "whip [Craig's] ass." Craig admitted that Marcum had not touched him. Thereafter, Tucker again met with Marcum and "reminded" Marcum that he was not to threaten or touch another employee. Tucker then reported these facts to Russell. No

discipline was taken against either employee. General Counsel contends that Respondent's failure to take disciplinary action against Marcum establishes Respondent's animus against the union activities of Craig and Brian Blair. [3] As stated earlier, thereafter, on May 24, Respondent issued a memorandum in which it lawfully voiced its opinion that Respondent and its employees were better off without a union.

Craig Blair worked in Respondent's engineering department and reported to Kevin Moore, engineering supervisor. Craig testified that he had received no discipline prior to the Union organizing campaign. However, the evidence shows that while Craig received no written discipline prior to August 2002, he had received numerous oral warnings and counseling from Moore. The undisputed evidence shows that Moore was dissatisfied with Blair's work in 1999 and sought to have Craig discharged in late 1999 or early 2000.[4] However, Tucker, Moore's supervisor, did not approve the discharge. Rather, Tucker assigned Craig to a special project, known as the Burgmeister project, which did not require as much skill as Craig's job as a project engineer. Further, this assignment would place Craig under the supervision of Kevin Wade, rather than Moore. Craig worked on this Burgmeister project until early 2002. During the 2-year period that Craig worked on this project he did a few projects for Moore. Moore testified that Craig's performance and effort did not improve. Further, Moore received negative comments about Craig's work from Kevin Wade.

Shortly after Craig Blair finished working on the Burgmeister project and returned to work under Moore's supervision, on February 15, 2002, Moore gave Craig an oral warning. The warning concerned excessive personal conversations. All of the employee's in Moore's department were given the same warning, however, Moore noted that Craig appeared to be the worst offender. That same date, Craig approached Moore and asked Moore for an assessment of his work. Moore reconfirmed to Craig that Moore believed that Craig had simply not learned from his years of experience in the engineering department. Moore explained that Craig should be "using knowledge and expertise gained on a particular design project and applying some of that knowledge to other projects." In his memorandum of this conversation, Moore noted, "As I have had similar conversations with Craig numerous times, he says he understands my concerns, but I do not feel that he fully recognizes his inabilities in design & thorough areas."

On July 15, 2002, Moore counseled Blair about a design problem, which had caused a delay in shipping one of Craig's projects. Moore told Craig that he had to pay closer attention to his design details. In August, Craig made an error on a simple project where he simply had to list two parts to an existing catalog number. At the hearing, Blair contended that he was sure that he had made the additions correctly and that somebody might have changed his project on the computer. Further, in August, just prior to the performance improvement plan at issue herein, Craig made some errors concerning a wiring diagram and logo detail. It took Blair two attempts to correct these problems. The sales assistant supervising this customer reported to Moore that Blair's errors had caused her considerable embarrassment and problems with the customer.

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[3] General Counsel offered evidence that in the past, two employees were suspended due to a physical confrontation outside of Respondent's facility, which had arisen during work, inside the facility. I find the incident involving suspensions for a physical confrontation is not similar to the verbal confrontation here. It is not unreasonable for Respondent to have taken stronger measures where a confrontation actually resulted in violence.

[4] In late 1999 and early 2000, at least two engineering department colleagues of Craig Blair had complained to Moore about Craig's work and had suggested that Blair be demoted or discharged.

In July 2002 and continuing in August 2002, Craig was assigned a project to create two metering pedestals for an electrical utility company. Moore testified that this was not a difficult or complex project and should have easily been performed by an employee with 18-24 months experience. Craig Blair had over seven years experience. Approximately 2½ weeks later Craig submitted his drawings for design review and checking, as is the custom in the engineering department. Another engineer checked Craig's work and found two major errors and brought the drawings to Moore. The employee reported to Moore that Blair's work revealed numerous errors, including two serious and obvious errors. The employee said he did not want the responsibility of correcting Blair's work and that he did not trust Blair to make the necessary corrections. The employee stated that Blair did not accept criticism and that he feared that Blair would try to blame him for any uncorrected errors. Moore said that he would take over the review of Blair's project. Moore reviewed this project and marked numerous errors for Blair to correct.

Moore went to discuss his concerns about Craig Blair with his supervisor James Tucker. Moore reported to Tucker that even though Blair had over seven years' experience in the engineering department, Craig was still making gross errors. Moore wanted to discharge Blair. Tucker, after discussing the issue with his supervisor, G. T. Carr, Respondent's vice president, determined to issue a performance improvement plan to give Blair one last chance to improve his performance. Tucker testified that because of the union organizing drive, Carr suggested that Tucker and Moore spell out to Craig his deficiencies and exactly what he had to do to maintain his job. Tucker and Moore agreed to give Craig 30 days to demonstrate improvement.

On Friday August 16, 2002, Moore called Craig Blair into his office with Tucker. Tucker explained Respondent's concerns with Blair's performance. Tucker explained that Respondent was concerned with the deficiencies in Craig's work and handed Blair a written performance improvement plan (PIP). Moore went through the list of 10 deficiencies. Blair stated that he felt that he was being picked on and singled out because of his union activities. Tucker denied that union activities had anything to do with the discipline. Both Tucker and Moore explained that Blair had 30 days to show that he could perform at a satisfactory level. The PIP listed eight measures that Blair could take to correct his deficiencies and improve his performance. Blair refused to sign the PIP. Then Moore stated that Craig should submit all his work directly to Moore for evaluation during the 30-day period. Blair asked if he could be demoted to the fabrication department rather than being discharged. Tucker stated that he would not do that.

At the hearing Tucker explained that he did not want to demote Craig Blair into production because Blair had not worked there for many years and would have to take a substantial wage reduction. He stated that he believed such a situation would result in a very unhappy situation for Blair and Respondent.

On August 16, after receiving the PIP, Craig claimed that he was upset and needed to take the rest of the day off. Moore reminded Craig that attendance was one of his deficiencies and stated that Blair should speak to Tucker about leaving early. Blair then told Tucker that he was too stressed to work that day. Tucker reminded Blair of his attendance problems but stated that if Craig was, in fact, too stressed to work, Blair should leave and return to work the following Monday focused and ready to work.

Following the PIP, Blair again went to work on the pedestal project. Blair resubmitted the project to Moore. Moore reviewed the design and found numerous errors. Moore explained to Blair that he had found major problems with Blair's design and that he did not understand how Blair could have overlooked so many major items. On September 12, Moore spoke to Blair about the pedestal project. Moore stated that he would not be ready to fully discuss the pedestal project with Craig until September 16. Blair acknowledged that he needed to pay more attention to detail

and apologized for the delays he had caused. Finally, Moore reassigned this project to another engineer. Moore further testified that in addition to the pedestal project, Blair made careless mistakes on two other projects during the 30-day performance improvement plan. On September 16, Tucker and Moore discharged Craig Blair. Moore told Blair that his performance had not improved and that he was being discharged.

Respondent offered the testimony of two project engineers who worked with Craig Blair to corroborate Moore's testimony that Blair's work was unsatisfactory. There were six employees in the engineering department at the end of Blair's employment. Two of those employees testified that they did not trust Blair to make corrections when they reviewed his work and that they did not trust Blair to review their work. Both employees testified that they evaded the normal channels for review in order to avoid having Blair check their work. According to the employees, Blair tried to blame others for his mistakes. Finally, both employees testified that they complained to Moore in the 1999-2000 period and again after Blair returned from working on the Burgmeister project in 2002.

Brian Blair worked for Respondent as a quality assurance inspector. His supervisor was Simon Westerfield, quality assurance manager. On August 13, 2002, Brian was working as a quality assurance inspector on the day shift with one other inspector, John Sanwald. About one hour into his shift, Brian became ill and decided to leave work and go home. Brian, believing Westefield had not yet arrived at work, told Sanwald to inform Westefield that he had left early because he was ill. Both Brian and Sanwald believed that Westefield was not yet present at work and that Blair was following the established procedure by notifying another employee.

Approximately an hour later, Westerfield approached Sanwald and asked about Brian Blair. Sanwald then informed Westerfield that Blair had left early because of illness. Westerfield became angry because he had been in the building but Blair had made no effort to call or page him. Further, Westerfield had made arrangements to temporarily reassign an employee from the night shift to the day shift so that he would have two quality inspectors on the shift. Westerfield's other day shift inspector was on leave. Westerfield was frustrated because, in spite of his efforts, he was still short one inspector that day. Further, Westerfield was frustrated because he had recently counseled Brian about his attendance record. Blair had missed more work than any other employee in the department and had missed substantial time in that calendar quarter. The evidence establishes that Westerfield keeps meticulous records of employee attendance.

Thus, on August 14, Westerfield wrote a warning for Blair stating that Blair had left work without proper notification and without Westerfield's approval.[5] However, Blair did not report to work again until August 15. On August 15, Westerfield gave Blair the written warning. Blair protested that he had followed the normal procedure by notifying another employee because he did not see Westerfield. Blair asked for a copy of the rule he had allegedly violated. Blair stated that he was being picked on and singled out because of his union activities. Blair refused to acknowledge receipt of the warning. Westerfield denied that the Union had anything to do with the warning. Based on this conversation, Westerfield drafted a revised warning in which he sought to better explain the warning given to Brian Blair.

On August 19, Westerfield gave Brian Blair a revised warning for "leaving work without properly notifying supervisor." In this rewrite of the warning, Westerfield acknowledged that Brian had notified a co-worker. However, Westerfield still maintained that this was not sufficient when

[5] The evidence establishes that a supervisor was discharged for attendance reasons shortly before Westerfield issued the warning to Brian Blair.

he was in the building at the time. Further, Westerfield reminded Blair that he had shifted an employee from the night shift to the day shift to avoid being one inspector short. He argued that Blair's conduct had negated his plans. Westerfield stressed the importance of quality assurance and stated his opinion that quality assurance employees should set an example for shop employees. He stated that while Brian had argued that the warning was unfair, he believed that the warning was fair. Brian again argued that he was being singled out and again refused to sign the warning.

The credible testimony of Sanwald and Brian Blair establishes that prior to August 13, 2002, employees left word with another employee, if they could not find Westerfield. Employees did not call or page Westerfield. No employee was disciplined for not contacting Westerfield directly. Since August 13, employees call or page Westerfield and leave him a voice mail, if necessary. Brian Blair is still working for Respondent, apparently without incident.

C. The Section 8(a)(3) Allegations

In *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399-403 (1983).

It has long been held that there are five principal elements that constitute a prima facie case insofar as Section 8(a)(3) and (1) are concerned. The first is that the employee alleged to be unlawfully disciplined must have engaged in union or protected activities. The second is that the employer knew about those protected activities. Third, there must be evidence that the employer harbored animus against those individuals because of such activities. Fourth, the employer must discriminate in terms of employment. Finally, the discipline must usually be connected to the protected activity in terms of timing. See e.g., *Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993).

The first issue is whether the discharge of Craig Blair was motivated by unlawful union considerations. As found earlier, Craig and Brian Blair were the employees who first contacted the Union. Respondent admits knowledge that these two employees were the leading union adherents. Thus, the first two elements have been established.

The third element of union animus is missing. While Respondent stated its preference that its facility remain unorganized there is no evidence or any allegation of unlawful statements in its memorandum to employees or in its two meeting s with employees. See e.g., *Meaden Screw Product*s, 325 NLRB 762 (1998); *Society to Advance the Retarded and Handicapped*, 324 NLRB 314 (1997).

The timing of the written PIP given to Craig Blair on its face does not lend itself to an inference that the warning was based on activities related to the union campaign. As of August 2002, nothing was taking place that would prompt Respondent to seek to retaliate against union adherents. The union organizational meetings had ended at the end of June. No representation petition had been filed. The timing of these events appears to me more likely linked to the shortcomings of Craig Blair, which resurfaced in February 2002 when Craig again began working under the supervision of Kevin Moore. However, Respondent decided because of

the union activities, to issue a PIP rather than to discharge Craig Blair. Further, Blair also was concerned about union activities when he accused Respondent of singling him out because of his union activities. Thus, both the employer and the employee were thinking and acting as if the union activities were still a significant concern. However, in my analysis it is more important that Blair encountered severe performance problems in July and August. On the whole I am convinced that the PIP and the subsequent discharge were set in motion when Craig Blair performed so poorly on the pedestal project.

In urging that Craig Blair's discharge herein was motivated by union activity rather than poor performance, the General Counsel argues (a) the failure of Respondent to give Blair a written warning prior to his union activity; (b) the failure of Respondent to discipline Marcum for his threats made while Blair was engaged in union activity; (c) Respondent's unwillingness to allow Blair to transfer to the fabrication department; and (d) his conclusion that Respondent was strongly opposed to union representation.

First, the record reveals that Respondent does not have an established policy of progressive discipline. Moore did not issue written warnings. However, the record clearly establishes that Craig Blair was given numerous oral warnings and that Moore had clearly expressed dissatisfaction with Blair's work product and work habits. This situation existed for an extended period of time and long before any union activities. While Blair worked for another supervisor, during 2000 and 2001, Moore's problems with Blair were temporarily put on hold. However, when Blair again began working for Moore, the same problems existed. Due to Respondent's lack of an established disciplinary procedure, Blair was given a PIP instead of being fired. Out of caution, Blair was given 30 days to improve his performance. Based upon his prior performance, it would seem unlikely that Blair could show sufficient improvement in only 30 days. However, in this case Blair continued to make serious errors on the pedestal project during his 30-day PIP period, removing any doubt that Moore and Tucker would terminate him.

While Respondent did not issue discipline to Marcum after the alleged threats to Craig Blair, Respondent did investigate the situation promptly and "remind Marcum" that he was not to threaten or touch another employee. The evidence that two employees had been suspended for a physical confrontation is not a similar circumstance. Contrary to the argument of the General Counsel, I do not find Respondent's handling of the verbal dispute with Marcum sufficient to taint this otherwise lawful discharge.

I find nothing unlawful in Tucker's refusal to permit Craig Blair to bump down into the fabrication department. Tucker reasoned that Blair had not worked in fabrication for a number of years and had been earning substantially more pay than the shop employees. According to Tucker, Craig Blair would have to had taken a significant pay cut and very likely would have been unhappy. This appears to be a legitimate business reason. There is no evidence of any other employee bumping back into fabrication from engineering.

Assuming arguendo, that General Counsel established a prima facie case, I find that Craig Blair would have been discharged in any event. The record contains a preponderance of convincing evidence that Craig Blair's work and performance did not meet Moore's expectations. The record establishes that Respondent's conduct was motivated solely by Moore's dissatisfaction with Craig Blair's continued poor performance and failure to improve. And although Respondent did not give Blair written warnings, Blair had been counseled about his poor performance at various times and Moore had seen no improvement in Blair's performance when Blair returned to work under Moore's supervision. Rather, Blair made numerous errors resulting in another engineer reporting serious errors on the pedestal project to

Moore and Moore taking over review of that project. Blair's errors on this project led to the PIP and his subsequent errors on that project during the 30-day PIP period led to his discharge.

Thus, on the basis of the entire record herein, I find that Respondent's conduct was motivated by legitimate business considerations and that Respondent would have discharged Craig Blair even in the absence of union activities. Accordingly, I recommend dismissal of this allegation of the complaint.

The next issue is whether the written warnings given to Brian Blair were motivated by unlawful union considerations. As found earlier, Brian Blair was active with his brother in initiating the union organizing drive. Respondent admits knowledge that the Blair brothers were the leading union adherents. Thus, Blair's union activities and Respondent's knowledge thereof have been established.

As stated earlier, the element of union animus is missing. While Respondent stated its preference that its facility remain unorganized there is no evidence or any allegation of unlawful statements in its memorandum to employees or in its two meetings with employees. See e.g., *Meaden Screw Products*, 325 NLRB 762 (1998*); Society to Advance the Retarded and Handicapped*, 324 NLRB 314 (1997).

Here the question of timing is entangled with the question of motivation. The warning was given immediately after Brian left work early and negated Westerfield's plan to have two quality assurance inspectors on duty. As stated earlier, as of August 2002, nothing was taking place that would prompt Respondent to seek to retaliate against union adherents. However, this warning was issued at the same time Respondent was deciding because of the union activities, to issue a PIP rather than to discharge Craig Blair. Further, Brian Blair also was concerned about union activities when he accused Respondent of singling him out because of his union activities. Westerfield issued a second warning in an attempt to defend Brian's allegation of discrimination and to explain his reasoning for a written warning.

The evidence indicates that Brian Blair was given a warning for notifying employee Sanwald that he was leaving work early due to illness. Both Sanwald and Blair believed that this was the usual procedure for leaving work early. On the other hand, Westerfield was upset because he was in Respondent's building but Brian had made no attempt to contact him. Further, Westerfield was displeased because he had made schedule changes in order to have two inspectors on duty and Blair's absence had thwarted his plans. I credit Westerfield's testimony and believe his anger and issuance of the warning were based on the work attendance issue and had nothing to do with Brian's union activities. The second warning was not discriminatorily motivated but rather an attempt to defend against an accusation of discrimination. Westerfield sought to fully explain his reasoning to defend against Brian's accusation and in an attempt to obtain Blair's acknowledgement of the warning. Accordingly, I recommend dismissal of this allegation of the complaint.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By posting a policy limiting solicitation and distribution by employees to interfere with employees' right to self-organization, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

The Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended.[6]

ORDER

Respondent, The Durham Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

   a. Posting or enforcing against employees the solicitation policy posted on July 8, 2002.

   b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

   a. Withdraw the solicitation policy posted at its Lebanon, Missouri, facility on July 8, 2002.

   b. Within 14 days after service by the Region, post at its Lebanon, Missouri, facilities copies of the attached Notice marked "Appendix".[7] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all

[6] All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

current employees and former employees employed by the Respondent at any time since July 8, 2002.

c. Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

Dated, at San Francisco, California, this 28th day of April 2004.

Jay R. Pollack
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated Section 8(a)(1) of the National Labor Relations Act, as amended, and has ordered us to post and abide by this notice

The National Labor Relations Act gives all employees the following rights:

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT post or enforce against employees, the solicitation policy that we posted on July 8, 2002, limiting soliciting and distributing by employees on behalf of United Food and Commercial Workers District Union Local Two or any other union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

The Durham Company

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

8600 Farley Street, Suite 100, Overland Park, KS 66212-4677
(913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (913) 967-3005.